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Nos. 71-1016 and 71-1040

Supreme Court, U. S.
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# In The Supreme Court of the United States

OCTOBER TERM, 1971

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FEDERAL POWER COMMISSION,

*Petitioner*

*v.*

LOUISIANA POWER & LIGHT CO., ET AL.

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UNITED GAS PIPE LINE CO. AND PENNZOIL UNITED, INC.,

*Petitioners*

*v.*

LOUISIANA POWER & LIGHT CO., ET AL.

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***On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit***

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## BRIEF OF UNITED AND PENNZOIL

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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## BRIEF OF UNITED AND PENNZOIL

### OPINIONS BELOW

The opinion of the court of appeals (United Pet. App. A, at 1a) is not yet reported. The opinion of the district court (A. 256; United Pet. App. C, at 30a) is reported at 332 F.Supp. 692.

### JURISDICTION

The judgment of the court of appeals (United Pet. App. B, at 28a) was entered on January 14, 1972. The petitions in 71-1016 and 71-1040 were filed on February 7, 1972, and February 14, 1972, respectively. The petitions were granted March 6, 1972 (A. 273). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether, in times of emergency, the Federal Power Commission has authority under the Natural Gas Act to accept, approve or modify a plan of an interstate pipeline for the curtailment of natural gas deliveries to both direct-sale and resale customers.[1]

2. Whether an appellate court should, in a collateral proceeding, determine the Federal Power Commission's jurisdiction over facilities being operated by an interstate pipeline when that issue is then being litigated before the Commission.

## STATUTES INVOLVED

The statutory provisions involved (United Pet. App. D, at 43a) are Sections 1(b), 4, 5, 7, 16 and 19(b) of the Natural Gas Act (Act), as amended, 15 U.S.C. §§ 717(b), 717c, 717d, 717f, 717*o*, 717r(b) (1970).[2]

## STATEMENT

This country faces a national energy crisis of mammoth proportions caused by the current industry-wide shortage of natural gas. A Federal Power Commission (FPC) staff report recently issued shows that this shortage will increase sharply in the coming years.[3] On March 2, 1972, the Chairman of the President's Oil Policy Committee testified before the Senate Committee on Interior and Insular Affairs that it will be necessary to ration gas on an end-

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[1] Direct-sale customers are customers who consume the gas purchased from United. Resale customers are customers who sell gas purchased from United to others, and include gas distribution companies and other pipelines.

[2] Act of June 21, 1938, 52 Stat. 821-24, 830-31.

[3] FPC, Staff Report No. 2: National Gas Supply and Demand 1971-1990 (February 1972).

use basis if present trends continue.[4] In the face of this crisis the court below held that the FPC is powerless to permit United to curtail deliveries to direct industrial users so as to insure adequate supplies for domestic consumptive use.

United Gas Pipe Line Co. (United), a jurisdictional pipeline,[5] is a major supplier of gas to jurisdictional pipelines supplying much of the gas used in the eastern half of the United States (FPC Pet. App. F, at 95a). All of United's sales, service and facilities, except some of those in its Victoria and New Orleans Divisions, have been certificated by the FPC pursuant to Section 7 of the Act (A. 173; R. 284). An application to certificate all of United's uncertificated sales, service and facilities is presently pending in a Section 7 certificate proceeding before the FPC (A. 173; R. 284-85). *United Gas Pipe Line Co.*, FPC Docket No. CP 71-89.[6]

Since November 1, 1970, United has been responding to the gas shortage by curtailing industrial gas deliveries to both direct and resale customers pursuant to plans filed in curtailment proceedings before the FPC.

On March 31, 1971, while the FPC was conducting hearings concerning United's curtailment plan, Louisiana Power & Light Company (LPL), one of United's direct-sale customers and a party to both the curtailment and certificate proceedings (A. 140-41, 154; R. 228-29, 251), filed a suit

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[4] Testimony of Gen. George A. Lincoln, Director of the Office of Emergency Preparedness, March 2, 1972.

[5] "Jurisdictional pipeline" means a pipeline which is subject to the jurisdiction of the FPC as a result of the transportation or sale for resale of natural gas in interstate commerce.

[6] On February 9, 1972, the FPC found that all of United's uncertificated sales, service and facilities are subject to FPC jurisdiction. *United Gas Pipe Line Co.*, FPC Docket No. CP71-89 (Opinion No. 610, February 9, 1972) (United Pet. App. F, at 91a).

collaterally attacking the FPC's jurisdiction to conduct both proceedings. Basing jurisdiction in the district court on 28 U.S.C. § 1332 because of diversity of citizenship, LPL claimed United's curtailment plan was a breach of its contracts with LPL and asked for an injunction against curtailment of deliveries to it pursuant to the plan (A. 11; R. 14).

On June 30, 1971, LPL's suit was dismissed for lack of jurisdiction (A. 266; R. 437). The district court held that the FPC proceeding in which United's curtailment plans had been filed was well within the FPC's jurisdiction and that LPL was required to exhaust its administrative remedies in that proceeding and the related[7] certificate proceeding (A. 256-66; R. 422-37).[8]

The court of appeals reversed. It held that the FPC has no jurisdiction to regulate curtailment of deliveries to direct industrial users, reasoning that once a direct sale is certificated pursuant to Section 7 of the Act, it may not

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[7] The curtailment and certificate proceedings are related because the FPC opinion finding curtailment jurisdiction, *United Gas Pipe Line Co.*, FPC Docket Nos. RP71-29, RP71-120, RP71-99 (Opinion 606, October 5, 1971), made clear that if the facilities for which certificates have been requested in the certificate proceeding are interstate in character and subject to FPC jurisdiction, the FPC ruling in the curtailment proceeding concerning the FPC's jurisdiction over curtailment programs will apply to volumes transported through those presently uncertificated facilities (United Pet. App. E, at 60a).

[8] This was the second dismissal for lack of jurisdiction. Also relying on the exhaustion doctrine, Judge Dawkins first dismissed the case on April 29, 1971, after considering briefs and after having heard argument from LPL on two occasions in connection with its request for a temporary restraining order (A. 116; R. 187-88). On May 14, 1971 an administrative panel of the Fifth Circuit vacated the judgment of dismissal, reinstated the restraining order which had been dissolved by the trial court and remanded the case for an evidentiary hearing on the jurisdictional issue and on such other preliminary issues as might properly be raised (A. 119-21; R. 192-96). Judge Dawkins at the request of LPL, then recused himself and the case was reassigned to Judge Scott.

be further regulated short of an FPC abandonment order (United Pet. App. A, at 22a). The court of appeals further held that the FPC has no regulatory jurisdiction over United's New Orleans District, reasoning that the flow of gas through that District is, in its view, essentially intrastate rather than interstate (United Pet. App. A, at 25a). The district court finding that the FPC's expertise was necessary for the proper consideration of such issues was disregarded (United Pet. App. A, at 23a).

## SUMMARY OF ARGUMENT

Not having enough gas to meet both industrial boiler fuel needs and the needs of domestic consumers, United and many other interstate pipelines have found it necessary to file curtailment plans with the FPC. In curtailment proceedings under Sections 4 and 5 of the Natural Gas Act, the FPC, as it did after World War II, has been attempting to protect small consumers by permitting these interstate pipelines to curtail industrial deliveries to both direct and resale customers.

In its opinion and order dealing with United's curtailment plan (Opinion 606), the FPC ruled that it has the authority in connection with its action on pipeline curtailment plans to allocate the interstate gas supplies of a jurisdictional pipeline among all that pipeline's customers, despite the fact that it has no rate jurisdiction over direct industrial sales. The court below, in a collateral proceeding, has held that the FPC does not have such jurisdiction. The court below also held that the FPC has no regulatory jurisdiction over United's New Orleans District and thereby deprived the FPC of the opportunity to make the initial determination of its jurisdiction over those facilities.[9]

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[9] The FPC has since determined that these facilities are jurisdictional. *See* note 6, *supra*.

United contends that the FPC curtailment ruling, rather than the decision of the court below, is correct and that, in light of the doctrine of exhaustion of administrative remedies, the court below improperly predetermined the FPC's jurisdiction over United's New Orleans District.

**A**

Section 1(b) of the Natural Gas Act gives the FPC plenary authority over interstate transportation. Curtailment is a matter of service interruption and thus is largely related to transportation, *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n*, 332 U.S. 507 (1947); as such, the problem of curtailments is clearly within the FPC's jurisdiction to regulate. Since Congress, by the passage of the Natural Gas Act, intended that there be a comprehensive and effective regulatory scheme, the inability of state agencies and individual courts to protect consumers in shortage situations confirms the FPC's curtailment jurisdiction. In addition, the FPC authority over curtailments is inherent in the FPC's obligation under Sections 4 and 5 to prevent unreasonable preferences or discriminations in service and its general powers under Section 16 to perform all acts necessary to discharge its statutory responsibilities. The FPC's curtailment authority is in no way limited by Section 7 of the Act since its transportation jurisdiction under Section 1(b) and its duty to prevent discrimination in service under Sections 4 and 5 exist independently of its certification and abandonment authority under Section 7.

**B**

LPL's claim that United's New Orleans District is a local system not subject to FPC regulation does not relieve LPL of the requirement that it exhaust its administrative rem-

edies in the FPC certificate proceedings. The court below should not have predetermined the FPC's certificate jurisdiction since Congress intended that FPC jurisdictional questions be reviewed by the court of appeals only in Section 19(b) review proceedings. The requirement of initial agency determination and review pursuant to Section 19(b) is particularly compelling when the jurisdictional result depends on analysis of a complicated factual picture and application of specialized legal concepts, based upon a full evidentiary record. In any case, the court of appeals based its holding upon a *de minimis* rationale which has been expressly rejected by this Court.

## ARGUMENT

### I. The FPC Has Curtailment Authority Over Deliveries To A Jurisdictional Pipeline's Direct Industrial Customers.

#### A. Section 1(b) Of The Act Gives The FPC Plenary Authority Over The Transportation Of Natural Gas In Interstate Commerce.

The language of Section 1(b) is clear and unambiguous; it states:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . . and to natural gas companies engaged in such transportation or sale. . . ." 15 U.S.C. § 717(b).

This Court has held that Section 1(b) gives the FPC regulatory authority over (1) transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n*, 332 U. S. 507 (1947). Although Congress limited the FPC's jurisdiction over *sales* to sales for resale, Congress in Section 1(b) gave the FPC unlimited jurisdiction over the *transportation* of all gas in interstate commerce, and over *companies* engaging in *such transportation.*

In *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 473 (1950), this Court reaffirmed the view, expressed three years earlier in the 1947 *Panhandle* decision, that Section 1(b) contains three discrete grants of jurisdiction by holding that East Ohio Gas was a "natural gas company" subject to the FPC's accounting regulations because it was engaged in the transportation of natural gas in interstate commerce, despite the fact that East Ohio Gas made only direct sales which were not subject to Commission rate regulation.

In reality, the court of appeals did not challenge the independent status of FPC transportation jurisdiction. Rather, the court of appeals seemed to think that the exercise of that transportation jurisdiction was somehow inconsistent with the Section 1(b) exemption of direct sales from FPC rate jurisdiction (United Pet., App. A, at 21a). The deficiency of this analysis is manifest in the decisions of this Court.

In *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) (*Transco*), the pipeline argued that the FPC could not consider the price factor in deciding whether or not to certificate a direct industrial sale because the FPC had no rate jurisdiction over direct sales. Characterizing the pipeline's argument as overly broad, 365 U.S. 1, 26, this Court observed that it had on several occasions rejected similar arguments. By way of example this Court, in *Transco*, referred to its holding in *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581 (1945), that the FPC could, in connection with fixing a pipeline's resale rates, take into account the value of the pipeline company's production and gathering facilities even though Section 1(b) exempts such facilities from FPC jurisdiction. As noted in *Transco*, in reaching the *Colorado Interstate* result, this Court rejected the argument that to include

the value of production and gathering facilities in a rate base was to regulate the production and gathering of natural gas contrary to the provisions of Section 1(b).

This Court concluded its disposition of the pipeline's argument by referring, 365 U.S. 1, 26, to its statement in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 325 U.S. 635, 646, (1945), to the effect that the FPC may take direct industrial rates into consideration when it fixes resale rates despite the fact that it has no jurisdiction over direct-sale rates.

Thus the fact that the FPC lacks rate jurisdiction over direct industral sales in no way limits the reach of the FPC's powers in discharging its obligations to regulate interstate transportation and the companies doing the transporting. The language of Section 1(b) and the decisions construing that language compel the conclusion that the separate grant of transportation jurisdiction gives the FPC the plenary authority over curtailment plans which it has asserted in Opinion 606.[10]

This independent grant of transportation authority is obviously what this Court had in mind when, in *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n, supra,* it said with respect to direct sales:

> "... [T]he matter of interrupting service is one largely related ... to transportation and thus within the jurisdiction of the Federal Power Commission to control,

[10] *United Gas Pipe Line Co.*, FPC Docket Nos. RP71-29, RP71-120, RP71-99 (Opinion 606, October 5, 1971) (United Pet. App. E, at 55a). On March 6, 1972, this Court denied United's petition for a writ of certiorari to review Opinion 606 prior to judgment in the court of appeals. Accordingly, the six review proceedings instituted pursuant to Section 19(b) of the Act are still pending in the court of appeals. By orders entered on January 28, 1972, and February 16, 1972, the court of appeals has consolidated these six proceedings; the lead case is *Louisiana Power & Light Co., et al.* v. *Federal Power Comm'n*, No. 71-3429 (5th Cir., filed December 3, 1971).

in accommodation of any conflicting interests among various states." 332 U.S. 507, 523.

This view, in light of the current shortage, is more important today than it was 25 years ago.

**B. Unless The FPC Has Curtailment Jurisdiction Over Industrial Gas There Can Be No Comprehensive And Effective Regulation Of Curtailment.**

In *Transco, supra*, this Court stated:

". . . Congress did not desire an 'attractive gap' in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource. Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation. See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 232 F. 2d 467." 365 U.S. 1, 28.

State regulatory agencies cannot deal effectively with the problems of service priorities created by an interstate pipeline's systemwide gas shortage. Indeed, state agencies face insurmountable obstacles; both practical and legal.

The natural gas transmission industry involves a vast interstate network of interconnected transmission lines (FPC Pet. App. H, at 93a). Most of these pipelines make some direct sales (FPC Pet. App. I, 95a). No state commission, even if it had jurisdiction over industrial sales within its borders, could regulate curtailments on a systemwide basis. Thus no state agency could insure that curtailment plans will prefer domestic needs over industrial boiler fuel requirements and thereby forge the complete, per-

manent and effective bond of protection to consumers for which the Act was framed. *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 147 (1960).

Aside from the inability of state regulatory agencies to regulate curtailments on a systemwide basis, other practical problems exist. A gas-producing state with growing industrial needs has a natural tendency to give those needs a high priority. For example, the Louisiana Public Service Commission instituted two proceedings against United for this express purpose,[11] and following the court of appeals decision in this case, filed suit against United and the FPC in furtherance of that purpose. *LPSC* v. *United Gas Pipe Line Co., et al.*, Civ. No. 17,631 (W.D. La., filed February 23, 1972).[12]

And even if a state agency's order increasing industrial deliveries within that state's borders were founded on reasons other than its desire to fuel industrial growth at the expense of consumers in other states, the resulting burden on interstate commerce would violate the commerce clause of the United States Constitution. *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *The Minnesota Rate Cases*, 230 U.S. 352, 381, 396-97, 400 (1913).

Nor can courts be expected to do the job. In *Atlanta Gas Light Co., et al.* v. *Southern Natural Gas Co., et al.*, Civ. No. 16060 (N.D. Ga., February 11, 1972), the court, in

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[11] *United Gas Pipe Line Co.*, LPSC Docket No. 11009 (Special Order 7-71, September 28, 1971); *Louisiana Intrastate Gas Corp., et al.*, LPSC Docket No. 11010 (General Order, September 30, 1971).

[12] The suit seeks an injunction to prevent United and the FPC from treating United's New Orleans District as a part of its interstate system. The immediate effect of the suit would be to remove direct-sale gas deliveries made through the facilities of the New Orleans District from FPC curtailment jurisdiction.

dismissing a suit similar to the one filed by LPL except involving sales for resale, noted:

> "At this time the FPC is the proper and only forum for a gas allocation determination—any different conclusion would lead to a chaotic situation since, for example, a court in Mississippi could determine what gas consumers should receive in that state while, at the same time, an Alabama court was trying to protect Alabama consumers of gas. If that kind of situation were allowed, certainly all of Southern Natural's customers in other states would begin the race to the courthouse. Then which would Southern Natural obey—more importantly, where would Southern Natural get the gas to meet all the mandates of the various courts?"[13]

Finally, one must not lose sight of the fact that depriving the FPC of jurisdiction over United's deliveries to LPL leaves those deliveries totally unregulated since the Loui-

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[13] A similar concern was voiced by the House Committee on Interstate and Foreign Commerce in 1947 in its consideration of a proposed amendment to the Act which would have expressly conferred upon the states regulatory authority over direct sales. In explaining its conclusion that such an amendment would not be in the public interest the House Commerce Committee stated:

> "Your committee feels that to alter the present situation would present a chaotic situation. If the States were given jurisdiction over direct sales by a pipe line traversing several States, it would be under a dual system of control by the Federal Power Commission and the States. There is no assurance of uniformity of treatment by the different states. The power to regulate direct sales would include the power of curtailment and interruption of service. The different States would conceivably have different views on the matter of curtailment and interruption regardless of its effect on the needs for gas in other States. Curtailment and interruption of service concerns more than one State and endless confusion and conflict would arise between different States demanding gas as between States and the pipe lines. Also it is conceivable that conflicts would arise between the Federal Power Commission jurisdiction as against the demands of the States to regulate prices, to interrupt service and to curtail service." H.R. REP. No. 800, 80th Cong., 1st Sess. 10-11 (1947).

siana Public Service Commission is constitutionally prohibited from exercising jurisdiction over any aspect of an industrial sale. LA. CONST. art. 6, § 4.

Recognition of these circumstances, in light of the Congressional purpose to effect a comprehensive regulatory scheme, is not to argue, as the court of appeals suggests, that need alone can create federal agency power (United Pet., App. A, at 16a). Rather, the argument demonstrates that Congress intended federal regulation of curtailment because the problem is one with which state agencies and individual courts cannot be expected to deal.

### C. FPC Authority Over Curtailments Is Inherent In Other Powers Granted By The Act.

The Congressional plan for federal regulation of the gas transmission industry is apparent from the structure of the Act. First, Congress made clear in Section 1(b) that it intended to regulate (1) all interstate transportation of gas and (2) the companies engaged in either interstate transportation or in sales for resale of gas in interstate commerce. Then, Congress took two principal approaches to effectuate its regulatory purpose. It (1) proscribed certain activity by jurisdictional pipelines in Sections 4 and 7 and (2) granted authority to the FPC in Sections 5, 7 and 16 to see that the standards of conduct laid down for jurisdictional pipelines were observed.

In Section 4(b) jurisdictional pipelines were told:

> "No natural-gas company shall, with respect to any transportation **or** sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any **undue** preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in

rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 15 U.S.C. § 717c(b). (Emphasis supplied.)

Further in Section 7(c) jurisdictional pipelines were told:

> "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." 15 U.S.C. § 717f(c).

In addition jurisdictional pipelines were told in Section 7(b) that they may not abandon any jurisdictional facilities or any service rendered by means of those facilities without Commission approval.

In Section 5(a) the FPC was told:

> Whenever the Commission . . . shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . ." 15 U.S.C. § 717d(a).

In addition to these duties, and the duties imposed on the FPC in Section 7 in connection with initial certification and

abandonment, Congress gave the FPC further broad powers in Section 16:

> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. . . ." 15 U.S.C. § 717*o*.

Just as Section 1(b) declares that the FPC has regulatory authority over both transportation and sales for resale, Sections 4 and 5 cover transportation *or* sale, service *and* rates.

Thus the argument that the Commission has no curtailment jurisdiction over industrial gas is an argument that the FPC, despite the prohibitions of Section 4 and the authority granted in Section 5, is powerless to prevent the undue preference and advantage which industrial customers will receive over domestic users if substantial industrial volumes are burned up under boilers during times of shortage. This argument was rejected by the Sixth Circuit in *Michigan Consolidated Gas Co* v. *Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (6th Cir. 1949) when it observed:

> "If the Commission has no authority to order adequate service to customers, in view of all the conditions and circumstances involved, the basic purpose of the Natural Gas Act fails of realization. We can attribute to the Congress no purpose to withhold from the Commission control over services. The power to prevent preferences and discrimination both as between individuals and classes, carried with it by necessary and inescapable implication, authority to regulate service." 173 F.2d 784, 789.

The attempt of the court below to distinguish this case on the ground that it involved a dispute between a pipeline and a resale customer will not stand examination. Although

its description of the parties is accurate, the court below failed to perceive that the Sixth Circuit's holding was based on the FPC's broad authority to prevent discriminations and was in no way based on the fact that Michigan Consolidated was a resale customer.

Likewise the Section 7 argument advanced by LPL and adopted by the court of appeals (United Pet. App. A, at 22a) is not persuasive. The court of appeals recognized that the FPC has the power under Section 7(c) to refuse to permit an industrial sale to be made in the first place and further power under Section 7(b) to order the abandonment of that sale. However, the court held that the FPC is powerless to order a temporary reduction in deliveries to direct customers in order to respond to an emergency created by a systemwide shortage of gas. In the court of appeals' view the FPC may respond to such a crisis only through abandonment proceedings under Section 7(b).

This result ignores the uniform holdings in rate and abandonment contexts that the FPC's exercise of jurisdiction granted by Section 1(b) is in no way dependent upon a certificate having been issued or even upon an application for a certificate having been filed. *Sun Oil* v. *FPC*, 281 F.2d 275 (5th Cir. 1960) (rate); *Magnolia Petroleum Co.* v. *FPC*, 226 F.2d 234 (5th Cir. 1959), *cert. denied sub nom.*, *Socony Mobil Oil Co.* v. *FPC*, 363 U.S. 842 (1960) (rate); *J. M. Huber Corp.* v. *FPC*, 236 F.2d 550, 556-57 (3d Cir. 1956), *cert. denied*, 352 U.S. 971 (1957) (abandonment). If the power to set rates and order abandonment may be exercised when no certificate has been issued, or even applied for, it is clear that curtailment authority exists independently of certificate status. It would be a curious result indeed to read the Act so as to give the FPC less power over a jurisdictional pipeline which has complied

with the Section 7 certificate requirements than it has over pipelines which have failed to comply with Section 7, or to conclude that an act which empowers the FPC to deny service altogether or to order its total and complete abandonment does not contain authority for the FPC to regulate curtailments during periods of shortage.

The result also has serious practical consequences. When a shortage arises it is imperative that a system of priorities be promptly imposed so that both the pipeline and its customers will know the delivery priorities. By requiring pipelines to file plans under Section 4 of the Act, as it did in Order 431,[14] the FPC can insure that consumers are protected as soon as the shortage arises. Section 7(b) abandonment proceedings do not have this inherent flexibility.

The FPC has broad authority under Sections 5 and 16 to prevent a jurisdictional pipeline from granting an undue preference or advantage to a particular class of service. That jurisdiction is in no way dependent on Section 7; indeed limiting its exercise to abandonment proceedings under Section 7(b) would effectively destroy the FPC's ability to prevent preferences in curtailment situations when total abandonment of service is not required.

### D. The FPC Has Exercised Curtailment Authority Over Direct Sales In Previous Shortage Situations.

As the FPC noted in Opinion 606 (United Pet. App. E, at 65a), curtailment situations are not new. Following World War II, the FPC required Panhandle Eastern Pipe Line Company to file rules and regulations governing curtailment and interruption of gas service. These rules, which were initially imposed by agreement between Panhandle and its customers, *City of Detroit v. Panhandle Eastern Pipe Line Co.*, 5 FPC 983 (1946), affected both direct and resale customers. The following year, when

[14] FPC Docket No. R-418 (April 15, 1971) (FPC Ex. 20; A. 239; R. 401).

voluntary agreements could not be reached, the FPC imposed similar rules without the consent of the parties. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 FPC 196 (1947).

In cases arising out of the FPC's issuance of the Panhandle curtailment orders, the lower courts repeatedly upheld the FPC's authority in curtailment situations.[15] Although these cases are not controlling, they reflect a long-standing interpretation of the Act by both the FPC and the lower courts which is entitled to considerable weight. *Boehm* v. *Commissioner*, 326 U.S. 287, 292 (1945); *United States* v. *American Trucking Ass'n, Inc.*, 310 U.S. 534 (1940); *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 84 (1932); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F.2d 467, 471 (3d Cir.), *cert. denied*, 352 U.S. 891 (1956).

In *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court stated:

> ". . . the width of administrative authority must be measured in part by the purposes for which it was conferred . . . . Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority." 390 U.S. 747, 776.

The FPC has broad authority over transportation and heavy responsibility to prevent discrimination by jurisdictional pipelines. Since only the FPC can effectively regulate curtailments, surely the FPC's broad responsibilities demand a generous construction of its authority in favor of direct-sale curtailment jurisdiction.

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[15] *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 226 F.2d 60, 79 (6th Cir. 1955), *cert. denied*, 350 U.S. 987 (1956); *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942 (6th Cir. 1949); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 80 F. Supp. 27, 30 (E.D. Mich. 1948), *aff'd*, 173 F.2d 784 (6th Cir. 1949).

**II. The FPC's Jurisdiction Over United's New Orleans District Can Be Determined Initially Only By The Commission And Reviewed Only By Petition To Review Under Section 19(b) Of The Act.**

**A. LPL's Claim That United's New Orleans District Is A Local System Not Subject To FPC Regulation Does Not Relieve It Of The Requirement That It Exhaust Its Administrative Remedies In The Certificate Proceeding.**

It has been settled since this Court's decisions in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and *FPC* v. *Arkansas Power & Light Co.*, 330 U.S. 802, *rev'g mem.* 156 F.2d 821 (D.C. Cir. 1946), that a party may not bypass an agency proceeding merely because the party claims that the agency lacks jurisdiction.

In *Arkansas Power & Light*, the effect of this Court's memorandum decision was to affirm the action of the district court, *Arkansas Power & Light Co.* v. *Federal Power Commission*, 60 F. Supp. 907 (D.D.C. 1945), dismissing a complaint for injunction for lack of subject matter jurisdiction.

In that case, as LPL did here, Arkansas Power & Light sought a declaration that the FPC had no jurisdiction to conduct a proceeding that it was attempting to conduct at the time the complaint for injunction was filed. In disposing of Arkansas Power & Light's claim that an asserted lack of FPC jurisdiction obviated the necessity for exhaustion of administrative remedies, the district court said:

> "If they are allowed to intervene and are aggrieved by an order thereafter issued by the Commission, they may obtain a review of such order as set forth in Sec. 313(b) of the Federal Power Act, supra. If they petition to intervene and their petition is denied, they may ob-

> tain a review of such order denying their petition under Sec. 313(b), supra. Moreover, it should be pointed out that the administrative remedies under the Federal Power Act have not been exhausted, and 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter' Myers v. Bethlehem Shipbuilding Corp., supra [303 U.S. 41, 58 S.Ct. 459,463]; Miles Laboratories v. Federal Trade Commission, supra." 60 F.Supp. 907, 908.

At the time LPL filed its suit the certificate proceeding was pending before the FPC. LPL was a party to that proceeding (A. 154; R. 251) and was contending in that proceeding that the FPC lacked jurisdiction over United's New Orleans District. Thus, the district court action dismissing LPL's complaint on the grounds that the FPC was competent to decide its jurisdiction in that proceeding and that LPL was required to exhaust its administrative remedies was clearly correct; the court of appeals action in deciding (United Pet. App. 8, at 22a-25a) that the Green System (United's New Orleans District) was not subject to FPC regulation was clearly improper.

The court of appeals rejection of the need for agency expertise in the resolution of this jurisdictional controversy is particularly violative of this Court's decision in *McKart* v. *United States*, 395 U.S. 185, (1969):

> "The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decision should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first

> chance to exercise that discretion or to apply that expertise." 395 U.S. 185, 193-94.

This Court's definitive discussion of the exhaustion doctrine in *McKart* illustrates another major deficiency in the court of appeals' decision. In evaluating the factors which normally require application of the exhaustion doctrine, this Court continued:

> "And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages." 395 U.S. 185, 194.

In this connection, although it is true that LPL did not seek an injunction against the certificate proceeding, the judgment of the court below has already disrupted the administrative process. Commissioner Carver suggests in his dissent in the certificate case, *United Gas Pipe Line Co.*, Docket No. CP71-89 (FPC Opinion 610, February 9, 1972) (United Pet. App. F, at 129a), that the court of appeals' decision, until reversed, deprives the FPC of any further authority to act in the certificate proceeding. The Louisiana Public Service Commission's suit against United and the FPC,[16] seeking an injunction against exercise of FPC regulatory jurisdiction over United's New Orleans District, is grounded on the theory that the court of appeals' decision deprives the FPC of jurisdiction. And in the Section 19(b) review proceedings,[17] LPL and the other petitioners in those proceedings argue that United and the FPC are bound under principles of res judicata by the court of appeals judgment in this case.[18]

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[16] *See* note 12, *supra*, and accompanying text.

[17] *See* note 10, *supra*.

[18] *E.g.* Br. LPL 17, *Louisiana Power & Light Co., et al.* v. *FPC*, No. 71-3429 (5th Cir.).

Accordingly, although there has been no injunction against further action in the FPC proceedings, the court of appeals' decision of the jurisdictional issue presented to the FPC in that proceeding clearly violates this Court's command in *McKart*, 395 U.S. 185, 194, that courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction.

In *Arkansas Power & Light*, *McKart* and *Myers* this Court makes clear that the FPC should have been given the opportunity to make the initial determination of its jurisdiction over United's New Orleans District. As this Court observed in *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173, 185 (1962), the need for initial agency determination of its jurisdiction is particularly compelling when the jurisdictional issue presented to a court is in the process of litigation before the agency.

**B. Congress Intended That FPC Jurisdictional Questions Be Reviewed By The Court Of Appeals Only In Section 19(b) Review Proceedings.**

In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), this Court, in the course of construing Section 313(b)[2] of the Federal Power Act, 16 U.S.C. § 825*l*(b), which is substantially identical to Section 19(b) of the Natural Gas Act, stated that Congress, through the Federal Power Act provision:

> ". . . prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders . . . . [and] necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy and all other modes of judicial review." 357 U.S. 320, 336. (Citations and footnotes omitted.)

The lower court decisions construing Section 19(b) of the Act have reached a similar conclusion. *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 209 F.2d 717 (10th Cir. 1953), *rev'd on other grounds*, 348 U.S. 492 (1955); *Algonquin Gas Transmission Co.* v. *Gregory*, 105 F. Supp. 64 (D. Conn. 1952).

These cases are consistent with this Court's holdings in other contexts that when Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems those procedures are to be exclusive. *E.g., Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965).

These decisions mean that under normal circumstances a court must not only give an agency the opportunity to make the initial determination of agency jurisdiction, but must also permit that jurisdictional determination to be reviewed pursuant to the statutory review procedures rather than in a collateral suit.

This principle is particularly applicable to this case. The jurisdictional result in the certificate case depends on a complicated factual analysis of interstate gas flows into and out of the New Orleans District and on the application of the commingling doctrine, *e.g., California* v. *Lo Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965); *Louisiana Public Service Comm'n* v. *Federal Power Comm'n*, 359 F.2d 525 (5th Cir.), *cert. denied*, 385 U.S. 833 (1966). Problems such as these including what the court of appeals described as "simple [gas] flow mechanics" (United Pet., App. A, at 23a) and the legal significance of the factual conclusions, clearly require agency expertise. *Cf. FPC* v. *Florida Power & Light Co.* 40 U.S. L. Week 4141 (1972).

Even a cursory comparison of the court of appeals' analysis of this complicated factual and legal issue (United

Pet., App. A, at 22-25a) with the FPC's analysis (United Pet., App. F at 97a-108a) demonstrates the danger of collateral determination of such jurisdictional issues. In the process of analyzing the incomplete record[19] introduced in the district court for the limited purpose of showing the nature of the issue being considered by the FPC (A. 151-58, 159; R. 246-59, 260), the court of appeals totally ignored the fact that on the 1971-72 peak day over 58 per cent of the gas flowing in United's New Orleans District (589,000 Mcf out of a peak day volume of 1,002,000 Mcf) would be interstate gas (United Ex. 22, Echterhoff Test. 10-11; A. 154, 159; R. 252, 264).

In addition, the court of appeals' characterization of the annual interstate volumes as "minor" (United Pet. App. A, at 22a), when contrasted with the FPC's sophisticated analysis of the *de minimis* contentions advanced in the certificate proceeding (United Pet. App. F, 101a-02a, 107-08a), demonstrates the importance of limiting review of such issues to the Section 19(b) procedures.[20]

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[19] As of the time of the district court hearing the CP71-89 record consisted of 43 pages of testimony and 15 exhibits. Formal hearings did not even begin until June 7, 1971, twelve days after the district court hearing was concluded (A. 1, 2). When the CP71-89 record was closed at the FPC, it consisted of 1,276 pages of transcript, 63 exhibits and 10 items by reference.

[20] When complicated questions of agency jurisdiction are litigated at the agency it is less likely that the reviewing court will be persuaded, as was the court of appeals in this case (United Pet. App. A, at 25a), to adopt theories like the *de minimis* concept discredited by this Court in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 535-36 (1945).

## CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed, and that of the district court, affirmed.

Respectfully submitted,

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March 17, 1972

# BRIEF FOR THE UNITED STATES

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Nos. 71-1016 and 71-1040

# In the Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION, PETITIONER

*v.*

LOUISIANA POWER & LIGHT COMPANY, ET AL.

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., PETITIONERS

*v.*

LOUISIANA POWER & LIGHT COMPANY

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE FEDERAL POWER COMMISSION

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE FEDERAL POWER COMMISSION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–27a)[1] is not yet reported. The opinion of the district court (Pet. App. 30a–42a) is reported at 332 F. Supp.

[1] "Pet." references are to the petitions in No. 71-1016; "United Pet." references are to the petitions in No. 71-1040.

692. An earlier order of the court of appeals (Pet. App. 43a–47a) is not reported.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 28a–29a) was entered on January 14, 1972. The petition for writs of certiorari in No. 71–1016 was filed on February 7, 1972; the petition in No. 71–1040 was filed on February 14, 1972. On March 6, 1972, this Court granted the petitions seeking review of the judgment of the court of appeals (App. 273). The jurisdiction of this Court in both cases is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Federal Power Commission has jurisdiction under the Natural Gas Act, 15 U.S.C. 717, *et seq.*, to accept, approve, or modify plans for the curtailing of natural gas deliveries by interstate pipelines to direct corporate users in order to effect a fair allocation of natural gas supplies among all ultimate gas consumers, including domestic users, in times of gas shortage.

2. Whether the Federal Power Commission, rather than the courts, should make the initial determination of the Commission's jurisdiction to issue a certificate of public convenience and necessity authorizing a jurisdictional interstate pipeline company to continue to operate certain pipeline facilities.

## STATUTES INVOLVED

Sections 1, 4, 5, 7 and 16 of the Natural Gas Act, 15 U.S.C. 717, 717c, 717d, 717f and 717o, are set forth in Appendix A, infra, pp. 41–49.

## STATEMENT

These cases involve the jurisdiction of the Federal Power Commission to allocate the gas supply of an interstate natural gas pipeline company when the company's gas supply is insufficient to meet its total contractual commitments. In a proceeding initiated by United Gas Pipe Line Company ("United"), the Commission determined that it had plenary jurisdiction over the curtailment of deliveries of natural gas in interstate commerce to all customers, including direct industrial users, regardless of any contracts with individual customers (Opinion No. 606, Pet. App. 48a–76a; the "curtailment proceeding"). Review of the Commission's determination in the curtailment proceeding is presently pending before the court of appeals.[2]

While the curtailment proceeding was pending before the Commission, Louisiana Power and Light Company ("LP&L") brought this action in the United States District Court for the Western District of Louisiana to enjoin United from curtailing natural gas deliveries to two of LP&L's generating plants. The district court dismissed the suit on the ground that curtailment proceedings are within the Commission's jurisdiction and that LP&L was required to exhaust its administrative remedies prior to seeking judicial relief. The court of appeals reversed, holding that the Commission has no curtailment jurisdiction over deliveries of natural gas transported

[2] On March 6, 1972, this Court denied petitions for writs of certiorari to review the Commission's determination prior to judgment by the court of appeals.

in interstate commerce by an interstate pipeline company to direct industrial customers (Pet. App. 12a–22a). Prior to the court of appeals' decision, the Commission issued its opinion reaching the contrary conclusion in the curtailment proceeding (Pet. App. 53a–66a).

The court of appeals also held that the Commission has no jurisdiction to issue a certificate of public convenience and necessity authorizing United to continue operating certain of its pipeline facilities used to deliver natural gas to one of LP&L's generating plants (Pet. App. 22a–26a), despite the pendency at that time of a proceeding initiated by United before the Commission involving the same issue.[3]

### A. PROCEEDINGS BEFORE THE COMMISSION

#### *The Curtailment Proceeding*

In October 1970, United, a natural gas company subject to the Commission's jurisdiction, filed a petition with the Commission for an order declaring that its implementation of a curtailment plan was consistent with the terms of its tariff on file with the Commission and its direct sales contracts (Pet. App. 48a–49a). The petition alleged that United did not have sufficient gas reserves to meet its total contractual commitments (*ibid.*). Following notice and interventions by numerous parties, including LP&L, the matter was set for hearing before an examiner. Extensive hearings followed in which all parties and inter-

[3] *United Gas Pipe Line Company*, FPC Docket No. CP71-89, referred to herein as the "certificate proceeding."

venors were given an opportunity to present evidence and file briefs. Before the hearings were completed, however, there were several further developments.

Subsequent to the presentation by United of its direct testimony, all parties and intervenors, except the Monsanto Company, agreed to a winter curtailment program for the period from November 1, 1970, until March 31, 1971.[1] On February 22, 1971, United filed a supplement to its original petition seeking a declaratory order that a proposed summer curtailment plan from April 1971 through October 1971 was consistent with its tariff and direct sales contracts (Pet. App. 51a). Finally, on May 17, 1971, United filed proposed tariff revisions containing a curtailment plan for the 1971–1972 winter heating season and thereafter.[2] These revisions were filed in response to Commission Order No. 431 (36 Fed. Reg. 7505; reproduced as Appendix B, *infra*, pp. 50–54), which announced a general curtailment policy and directed jurisdictional pipelines anticipating gas shortages either to file tariff revisions setting forth a curtailment plan conforming to the policy or to file a statement explaining how existing curtailment plans con-

[1] Monsanto's appeal from the Commission's order approving that winter curtailment program is now pending before the United States Court of Appeals for the District of Columbia Circuit. *Monsanto Co.* v. *Federal Power Commission*, No. 71-1396 (C.A. D.C.).

[2] These revisions became effective on November 2, 1971, following a one-day suspension by the Commission (Pet. App. 52a). The validity of that order is pending on review in *Mobile Gas Service Corp., et al.* v. *Federal Power Commission*, No. 71-1607 (C.A. D.C.).

form to the policy (App. B, *infra*, p. 52). The order stated that any tariff revisions so filed, if approved by the Commission, would override inconsistent provisions in all sales contracts (*id.* at 53–54).

The hearings on United's plans and tariff revisions were completed in July 1971. Since a number of parties, including respondent LP&L, were claiming that the Commission has no jurisdiction over the curtailment of service to direct industrial customers, as distinguished from resale customers (*i.e.*, distributors and other pipelines), the intermediate decision of the examiner was waived and the matter was presented to the Commission for decision (Pet. App. 52a).

On October 5, 1971, the Commission issued Opinion No. 606 (Pet. App. 48a–76a), holding, *inter alia*, that it has plenary jurisdiction under the Natural Gas Act to accept, approve or modify the curtailment plans proposed by United or any other jurisdictional pipeline company relating to gas transported in interstate commerce to either direct or resale customers.[6] This jurisdiction, the Commission ruled, flows primarily from the Act's application, under Section 1(b), to the "transportation of natural gas in interstate commerce" and the Commission's authority under Sections 4(b) and 5(a) of the Act to prohibit undue preferences or unreasonable differences in service among classes of customers (Pet. App. 55a, 61a). In rejecting the contention that it can not allocate nat-

[6] Specific issues relating to the proper interpretation and reasonableness of United's curtailment plans were remanded to the presiding examiner for initial decision (Pet. App. 75a).

ural gas in a manner inconsistent with a pipeline's direct sales contracts, the Commission noted (Pet. App. 53a–54a):

> It follows from this argument that if the gas supply is insufficient to meet the contracted requirements of all consumers, then the direct industrial users might get their gas first, leaving only the remainder to the resale consumers—made up of households, hospitals, schools, public buildings, and industrial and commercial establishments in all states served by the jurisdictional pipelines.

Petitions for review of the Commission's decision, filed pursuant to Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)), are now pending before the United States Court of Appeals for the Fifth Circuit.[7]

*The Certificate Proceeding*

Also in October 1970, United filed an application with the Commission for a certificate of public convenience and necessity authorizing it to continue operating a portion of its pipeline facilities which is located wholly within Louisiana and is used to supply LP&L's Nine-Mile Point generating station (Pet. App. 53a). United alleged that these facilities were previously part of an intrastate system (Green Sys-

[7] Petitions for review have been filed by the following companies: *Louisiana Power & Light Company* (No. 71-3429), *International Paper Company* (No. 71-3531), *Gulf States Utilities Company* (No. 71-3627), *Mississippi Power & Light Company* (No. 72-1003), *Mississippi Valley Gas Company* (No. 72-1157), and *The State of Louisiana, et al.* (No. 72-1220). The first four cases were consolidated by order of the Fifth Circuit dated January 28, 1972.

tem) but had become subject to federal jurisdiction by virtue of the injection into the system of a quantity of gas in interstate commerce. Numerous parties, including LP&L, intervened and hearings were held. The decision by the examiner was waived and the matter was presented to the Commission for decision.

On February 9, 1972, the Commission issued Opinion No. 610 (United Pet. App. 91a–131a), holding that the facilities and sales in question are subject to the Commission's jurisdiction since substantial volumes of interstate gas had been introduced into the previously intrastate system and commingled with intrastate gas.[5] The Commission noted that previous judicial decisions have established that the commingling of interstate gas with intrastate gas brings the entire stream within the jurisdiction of the Commission (United Pet. App. 112a–113a; *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366; *Louisiana Public Service Commission* v. *Federal Power Commission*, 359 F. 2d 525 (C.A. 5), certiorari denied, 385 U. S. 833). The Commission also held that the relative volume of interstate gas on the facilities is not controlling (United Pet. App. 106a–108a; *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 535–536;

[5] On February 23, 1972, the Louisiana Public Service Commission filed suit in the United States District Court for the Western District of Louisiana against United and the individual Commission members, claiming that Opinion 610 constitutes an *ultra vires* action in view of the decision of the court of appeals in the instant case (see pp. 11–12, *infra*) and seeking to enjoin the Commission from exercising any jurisdiction over the Green System and from issuing any certificates relative to that system.

*Federal Power Commission* v. *Florida Power & Light Co.*, Sup. Ct., No. 70–38, decided January 12, 1972, slip op., p. 9, n. 10). The Commission reserved judgment on whether a certificate of public convenience and necessity should be issued in this case, remanding the matter to the hearing examiner for initial decision following the receipt of additional evidence (United Pet. App. 125a–126a).

B. THE INSTANT PROCEEDING

In March 1971, while both of the above proceedings were still pending before the Commission, LP&L[9] initiated the present case by filing an action in the district court seeking an injunction restraining United from curtailing service to its Sterlington and Nine-Mile Point generating stations and ordering United to deliver gas to LP&L in accordance with existing contracts (App. 3–11).

Following an *ex parte* hearing, LP&L obtained a temporary restraining order directing United to deliver full contract quantities of natural gas without curtailment to LP&L's generating plants (App. 111–113). After the Commission intervened, the district court dissolved the temporary restraining order and dismissed LP&L's suit on grounds that the Commission has exclusive jurisdiction over curtailments and that LP&L had failed to exhaust its administrative rem-

[9] LP&L is one of the constituent companies of a holding company known as Middle South Utilities Company, which also includes Mississippi Power and Light Co., New Orleans Public Service, Inc., and Arkansas Power and Light Co.

edies (App. 116).[10] LP&L immediately obtained an *ex parte* reinstatement of the temporary restraining order by a judge of the court of appeals (App. 117). Thereafter, in May 1971, a three-judge panel of the court of appeals refused to dissolve the temporary restraining order and remanded the case to the district court for an evidentiary hearing on the jurisdictional issue (App. 119–121; Pet. App. 43a–47a).

Following an evidentiary hearing, the district court again held that the Commission has jurisdiction over United's curtailment program, as well as jurisdiction to determine the certificate controversy. Alternately, the court held that LP&L had failed to establish irreparable injury warranting injunctive relief. Accordingly, the complaint was dismissed (App. 265–267; Pet. App. 30a–42a).

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[10] Similar suits initiated by two of United's other direct sales customers have recently been dismissed by another district court. *Texas Gulf Sulphur Co.*, v. *United Gas Pipe Line Co.* (D.D.C.), Civil Action No. 2253–71, dismissed January 21, 1972; *Monsanto Co.* v. *United Gas Pipe Line Co.* (D.D.C.), Civil Action No. 2037–71, dismissed January 21, 1972. Both cases have been appealed to the United States Court of Appeals for the District of Columbia Circuit (Nos. 72–1093, 72–1094) and consolidated for decision with *Monsanto Co. v. Federal Power Commission*, No. 71–1306 (C.A.D.C.). Appellants relying on the Fifth Circuit's decision in the present case, sought a stay and an injunction pending appeal. This request was denied on February 11, 1972. Suits by resale customers of other pipelines have been filed in *Atlanta Gas Light Co., et al.* v. *Southern Natural Gas Co., et al.*, (N.D. Ga.), Civil Action No. 16060, dismissed February 11, 1972, and *Roanoke Gas Company* v. *Columbia Gas Transmission Corp.*, (W.D. Va.), Civil Action No. 71–C–146–R. *Atlanta Gas Light* has now been appealed to the Fifth Circuit (No. 72–1539) and a motion has been made to consolidate it with *Atlanta Gas Light Co., et al.* v. *Federal Power Commission*, No. 72–1475 (C.A. 5).

On appeal, the court of appeals reversed, holding that the Commission is without jurisdiction to order curtailments of gas deliveries to direct industrial customers (Pet. App. 22a). The court noted that under Section 7 of the Act the Commission has jurisdiction to grant initial certificates of public convenience and necessity for direct sales and to authorize abandonment of such sales, but held that between these two extremes, direct sales are immune from federal regulation (Pet. App. 16a–22a). Although stating that it was withholding judgment on the "conclusions" reached by the Commission in its opinion in the curtailment proceeding (Pet. App. 27a), which had been issued some three months earlier and had been referred to extensively in the briefs and arguments before the court, the court set forth the rationale of the Commission's decision in favor of curtailment jurisdiction and squarely rejected it (Pet. App. 6a, 7a, 22a).

The court of appeals also held that the Commission has no jurisdiction to issue a certificate of public convenience and necessity covering the portion of United's pipeline facilities used to deliver natural gas to LR&L's Nine-Mile Point generating plant. The court decided the issue notwithstanding the fact that the certificate controversy was pending before, and had not then been decided by, the Commission. The court reasoned that the flow of gas through such facilities is essentially in intrastate, rather than interstate, commerce and thus is exempt from federal regulation (Pet. App. 22a–26a). The claim that the Commission should be given the opportunity to deter-

mine in the first instance whether it has jurisdiction over the facilities was rejected (Pet. App. 26a). On February 23, 1972, LP&L, relying upon the court of appeals' decision, moved in the district court for reinstatement of the temporary restraining order previously issued.

On March 6, 1972, this Court granted the petitions filed by the Commission, United and Pennzoil for writs of certiorari to review the decision of the court of appeals, but denied the petitions of the same parties seeking review before judgment in the court of appeals of the Commission's curtailment decision (App. 273).

## SUMMARY OF ARGUMENT

### I

In essence, the controversy here requires a determination whether the Commission has jurisdiction to allocate natural gas transported in interstate commerce by pipelines among all consumers in a fair and equitable manner when gas shortages make full deliveries to all customers impossible.

A. The court of appeals held that the Commission has no authority over curtailments of service to direct industrial customers and that the Commission's authority over direct industrial customers is limited to issuing certificates of public convenience and necessity covering deliveries of gas and authorizing their abandonment under Section 7 of the Natural Gas Act, 15 U.S.C. 717f. The effect of this decision, if sustained, would be to impair the Commission's ability to assure adequate supplies of natural gas to consumers

without alternative sources of fuel, such as homes, hospitals, schools, public buildings and some commercial establishments. Instead of the establishment under the Commission's supervision of a rational system of priorities for the allocation of scarce interstate natural gas supplies based on the needs of all customers, priorities would turn on the interpretation of contracts by courts and state regulatory authorities.

Prescribing priorities of natural gas service is not a suitable task for the courts. Curtailment controversies are highly complex, and a decision with respect to one customer or class of customers of a pipeline necessarily affects all of the pipeline's other customers. Moreover, because of their substantial impact on interstate commerce, such controversies may be beyond the constitutional power of state courts and regulatory agencies to resolve and, in any event, present problems requiring national resolution.

The Commission alone is in a position to adopt comprehensive curtailment policies in times of shortages of natural gas in interstate commerce. An examination of Sections 1(b), 4, 5 and 16 of the Natural Gas Act and decisions of this Court confirms that the Commission has comprehensive authority over curtailments of service of interstate natural gas to direct industrial customers.

B. Under Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), the Act's provisions apply to the transportation of natural gas in interstate commerce and, separately, to its sale for resale. While the Commission thus has no continuing rate jurisdiction over

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direct industrial sales, its jurisdiction over the "transportation" of the gas involved in such sales is unrestricted. As this Court has recognized in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 523, and *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 27–28, the matter of curtailments of deliveries of natural gas to direct industrial customers is one related to transportation and thus within the jurisdiction of the Commission.

The Commission's authority over curtailments is defined by Sections 4, 5 and 16 of the Act, 15 U.S.C. 717c, 717d and 717o. Under Section 16, the Commission is given the broad power to take all appropriate actions to carry out the provisions of the Act. Section 4(b) provides the substantive standard for evaluating curtailment plans, prohibiting pipelines with respect to any transportation or sale of gas subject to the Commission's jurisdiction from granting any undue preference to a person or from unreasonably discriminating against any person. Under Section 5(a), which is incorporated by reference into Section 4(e), the Commission can set aside any provisions of tariffs or contracts it finds unduly discriminatory or preferential or otherwise unjust or unreasonable. Finally, when curtailment plans are filed under Section 4, the Commission may let them take effect pending an investigation and hearing on their lawfulness.

To meet the current shortage of interstate natural gas forcing many pipelines into curtailment, the Commission issued Order No. 431 (App. B, *infra*, pp. 50–54),

requiring pipelines to take all reasonable steps to assure adequate service to their customers and, where necessary, to file curtailment plans amending existing tariffs. By adopting this procedure, the Commission brought into play the procedures of Section 4(e) whereby curtailment plans could be allowed to take effect to meet emergency conditions, pending a full investigation. The Commission's approach, we submit, was a valid exercise of its comprehensive curtailment jurisdiction.

## II

The court of appeals also erred in ruling that the Commission has no jurisdiction to issue a certificate of public convenience and necessity covering the portion of United's pipeline facilities used to deliver natural gas to LP&L's Nine-Mile Point generating plant. In so ruling, the court improperly failed to follow the long standing rule that questions relating to an agency's subject matter jurisdiction should be decided by the agency in the first instance. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

Subsequent to the court's decision, the Commission issued an opinion holding that it does have certificate jurisdiction over the facilities in question (United Pet. App. 91a–131a). While we believe the Commission's decision is correct, the instant record does not afford an adequate basis for resolving the issue; accordingly, we ask the Court to reverse the judgment of the court below so that review of the Commission's certificate decision can proceed in due course.

## ARGUMENT

### *Introduction—the Problem*

In reversing the district court's dismissal of LP&L's suit for an injunction and remanding the case for further proceedings on the issue whether LP&L would suffer irreparable injury if its contracts were not enforced in full, the court of appeals based its decision on its belief that the Commission has no continuing jurisdiction over the curtailment of natural gas deliveries by interstate pipelines to direct corporate users (Pet. App. 12a–22a). If the court was wrong and the Commission has jurisdiction over curtailment plans affecting an interstate pipeline's direct corporate users, LP&L's suit should be dismissed. Moreover, there is no occasion for this Court to consider the question (not presented in our petition, see Pet. 20–21, or in that of United and Pennzoil) whether the court of appeals should have deferred to the Commission for an initial determination of the Commission's curtailment jurisdiction. Some three months prior to the decision below, the Commission issued its opinion in the curtailment proceeding fully sustaining its curtailment authority (Pet. App. 53a–66a); the rationale of the Commission's opinion was fully considered and rejected by the court below (Pet. App. 6a, 7a, 22a). Accordingly, the issue of the Commission's ultimate authority over curtailments is squarely presented by this case.[11]

[11] Although in our petitions we sought review before judgment of the Commission's curtailment opinion, as well as review of the decision below, we did so solely to give the

In order to appreciate the practical effect of the decision of the court of appeals, some background is necessary. Interstate pipelines which do not have sufficient supplies of natural gas to meet their contractual commitments to their customers are permitted to make emergency purchases for up to 60 days at any price without Commission approval (see Commission Orders Nos. 402 and 402A, 35 Fed. Reg. 7511, 8927; see also 18 C.F.R. 157.22) and for longer periods with Commission authorization (see Commission Order No. 431, reproduced as App. B, *infra*, pp. 50–54). Fourteen interstate pipelines have made emergency purchases of natural gas. Seven, including United, are unable to meet their contractual commitments and are currently in curtailment (see Pet. App. 93a for a map showing the pipelines presently in curtailment). At the present time, there are 26 cases pending before the Commission involving proposed curtailment plans (most filed in response to Commission Order No. 431) and several cases pending in the federal courts[9] which will be controlled by the decision in these cases.

Under the decision of the court of appeals, the contractual provisions of a pipeline's direct sales contracts as interpreted by various courts or state

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Court the opportunity to hear the cases in the fullest possible context. Our petition specifically pointed out that the basic curtailment issue is presented by the decision of the court of appeals alone (Pet. 12–13, 20–21).

[9] *Mobile Gas Service Corp., et al. v. Federal Power Commission*, No. 71-1607 (C.A.D.C.); *Michigan Power Co. v. Federal Power Commission*, No. 71-1752 (C.A.D.C.); *Alabama Gas Corp. v. Federal Power Commission*, No. 72-1415 (C.A.5); and cases cited in note 10 *supra*.

agencies,[12] rather than the Commission's judgment as to what is in the public interest in light of *all* contractual arrangements and the needs of *all* customers, would govern the allocation of scarce gas supplies between direct industrial users on the one hand, and resale customers, and ultimately home and other consumers, on the other hand.

In the view of the court below, the Commission's authority over direct industrial sales is limited to issuing original certificates of public convenience and necessity for such sales and authorizing their abandonment under Section 7 of the Natural Gas Act, 15 U.S.C. 717f. While the Commission does consider the terms of direct sales contracts in determining whether to issue certificates and may condition the issuance of a certificate on modification of the terms of a contract,[14] such initial approval does not obviate the need for Commission authority to override the terms of the contract in times of emergency such as when a pipeline cannot meet its contractual commitment because of inadequate gas supplies.[15]

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[13] There is serious doubt, however, whether state authorities have the requisite power to act in this area, even assuming that the Commission is without jurisdiction. See pp. 25–26, *infra*.

[14] The Commission takes into account a large variety of factors in determining whether to issue a certificate under Section 7 and can do so only "when a balance of *all* the circumstances weighs against certification." *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 17 (emphasis by the Court).

[15] Nor does the Commission's power to authorize abandonments under Section 7(b) satisfy the Commission's need for

In the first place the federal or state courts are not suited for, or charged with, the responsibility of prescribing priorities of natural gas service under the guise of interpreting and applying impairment of deliveries provisions in direct sales contracts.[16] Even where such contracts permit the subordination of industrial gas needs to domestic consumption, each court entertaining a contract dispute would be required, in effect, to conduct a system-wide curtailment proceeding to determine initially the extent of domestic requirements. Furthermore, judicial determinations as to the nature of a pipeline's shortage, the extent of domestic requirements, and the rights of industrial customers could vary from state to state and court to

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comprehensive authority over curtailments. Conditions necessitating curtailments may be temporary or fluctuate from week to week, depending upon the weather, air pollution alerts or other factors. Moreover, a pipeline's shortage of gas may be mitigated as more gas is made available in response to various developments such as an area rate decision by the Commission. If, as we argue, the Commission has continuing authority over curtailments of service to direct industrial customers, the long term viability of direct sales contracts will be enhanced. Rather than being permanently cut off by forced total or partial abandonments, such customers would continue to receive as much gas as possible—consistent with a rational set of priorities—during a shortage and would again receive their full contract volumes when the emergency has ended.

[16] Natural gas contracts may provide for either firm service or interruptible service—*i.e.*, service which may be interrupted under a variety of circumstances. The mere fact that a contract provides for "interruptible" service, however, does not mean that in time of natural gas shortages deliveries under that contract will automatically be cut off. "Interruptible" provisions vary and may call for deliveries even when a pipeline is forced into curtailment. Cf. *Granite City Steel Co.* v. *Federal Power Commission*, 320 F. 2d 711 (C.A.D.C.).

court with no uniformity of regulation.[7] Finally, curtailments in service during times of gas shortage would be based upon contract terms reflecting the relative bargaining powers of the contracting parties, rather than the changing needs of the public interest. Only exclusive primary consideration by the Commission can assure the uniformity necessarily demanded to achieve equitable implementation of curtailment plans with due regard for all the needs of the public.

In sum, if the Commission is denied power to override, where necessary, provisions in direct sales contracts during an emergency, its ability to assure adequate supplies of natural gas to consumers without alternative sources of fuel—principally human needs customers such as homes, hospitals, schools, public buildings and some commercial establishments—will be severely impaired. Instead of a Commission-approved, uniform and rational system of allocating scarce supplies of natural gas in interstate commerce, a chaotic system of allocation would be likely to prevail with direct industrial users obtaining varying court-ordered priorities, many of which might be contrary to the overall public interest and result in in-

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[7] Also, curtailment provisions in different direct sales contracts entered into by a single pipeline may be inconsistent, making it impossible for the pipeline to comply with both contracts. Indeed, in this very case, the impairment of deliveries provision in United's contract to deliver gas to LP&L's Sterlington generating station (App. 23) establishes priorities that differ from and are inconsistent with those in the comparable provision in United's contract for service to LP&L's Nine-Mile Point plant (App. 88). Clearly, the Commission is best suited to resolve such inconsistencies.

adequate supplies of natural gas for human needs customers.

It is, therefore, essential that the contracts remain fully subject to the Commission's "plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests." *Permian Basin Area, Rate Cases*, 390 U.S. 747, 784. That the Commission does have "plenary authority" over curtailments of interstate natural gas to direct industrial customers is, we submit, apparent from an examination of Sections 1(b), 4, 5 and 16 of the Natural Gas Act, 15 U.S.C. 717(b), 717c, 717d, 717o.

## I

### THE COMMISSION HAS BROAD AUTHORITY OVER THE CURTAILMENT OF DELIVERIES OF NATURAL GAS IN INTERSTATE COMMERCE TO ALL CLASSES OF A PIPELINE'S CUSTOMERS

#### A. UNDER SECTION 1(b) OF THE NATURAL GAS ACT, THE PROVISIONS OF THE ACT APPLY TO THE CURTAILMENT OF DELIVERIES TO DIRECT INDUSTRIAL USERS

Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), specifies that the Act's provisions apply

> * * * to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas * * *.

Thus, as this Court has noted, *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 516,[18]—the Commission's authority under the Act extends to three distinct areas. While the application of the Act to *sales* is limited to sales of interstate natural gas for resale, the Act applies without limitation to the transportation of all gas in interstate commerce and to natural gas companies[19] engaged in such transportation. For this reason, the absence of Commission jurisdiction over the rates at which direct industrial sales are made[19a] has no effect upon its unrestricted authority over the *transportation* of interstate gas involved in such sales.[20]

[18] See also *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 473, where the Court held that even though a company makes only direct sales of natural gas, it is nevertheless engaged in the transportation of natural gas in interstate commerce and is thus a "natural-gas company" subject to the Commission's accounting regulations and the reporting requirements of the Act.

[19] A "natural-gas company" is defined by Section 2(6) of the Act, 15 U.S.C. 717a(6), as a company "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

[19a] Except as a factor to be considered in certifying direct sales under Section 7 of the Act (see pp. 24–25, *infra*). And see *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635, 647, where this Court noted that it "is clear that contracts covering direct industrial sales" come within the portion of Section 5(a) referring to "any rule, regulation, practice, or contract *affecting*" (emphasis added) any rate, charge or classification imposed by a natural gas company.

[20] The cases relied on by the court below (Pet. App. 20a)—*Colorado Interstate Gas Co.* v. *Federal Power Commission*, 185 F. 2d 357 (C.A. 3), and *City of Hastings* v. *Federal Power Commission*, 221 F. 2d 31 (C.A.D.C.), certiorari denied, 349 U.S. 920—involved disputes over rates and thus have no bearing on the issue presented here.

It is the statutory grant of authority over "transportation" which forms the basis of the Commission's curtailment jurisdiction—as two decisions of this Court have recognized. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, *supra*, 332 U.S. at 523; *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 27–28.

In *Panhandle Eastern*, the Court affirmed a state court ruling upholding the authority of the Indiana Public Service Commission to regulate certain aspects of direct industrial sales of interstate natural gas by a pipeline. The Court reviewed in some detail the legislative history of the Natural Gas Act, and concluded that the comprehensive scheme adopted by Congress for the protection of consumers is one of "cooperative action between federal and state agencies" leaving no regulatory gap which might permit natural gas companies to "divert * * * all or the cream of their business to unregulated industrial uses." 332 U.S. at 520–521. Thus, to the extent the Commission's authority does not extend to direct industrial *sales*, Congress intended such sales to be subject to regulation by the States. 332 U.S. at 516–

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The Commission does not consider rate differences to be significant in determining priorities in the curtailment of service. Rejecting a proposal by United to give lowest curtailment priority to power plant and industrial customers that pay noncompensatory rates, the Commission in its curtailment decision noted that, "there is little correlation between the need to curtail deliveries because of inadequate gas reserves and the degree of compensation received for the sale of the limited gas supplies which are available" (Pet. App. 68a).

519. Of particular significance here was the Court's rejection in *Panhandle Eastern* of the contention that dual regulation was untenable because of the conflicts which might develop among state regulatory commissions and between state and federal authorities, particularly with respect to the curtailment of service when required by weather or other conditions. The Court stated that "if such conflict should develop, the matter of interrupting service is one largely related * * * to transportation and thus within the jurisdiction of the Federal Power Commission to control, 'in accommodation of any conflicting interests among various states.'" 332 U.S. at 523.

The conclusions reached in *Panhandle Eastern* with respect to curtailments were reaffirmed in *Transcontinental Gas, supra.* In that case, the Court held that the Commission could consider the proposed end use of natural gas (which was use under an electric power utility's boilers to produce electricity) and the impact that the proposed price would have on natural gas prices generally, as factors to be weighed in determining whether to issue a certificate of public convenience and necessity under Section 7 for a direct industrial sale to be transported by an interstate pipeline. Both factors involved considerations transcending state lines which, in view of Congress' desire to avoid regulatory gaps, were particularly appropriate for resolution by the federal agency. 365 U.S. at 20–22, 27–28. After quoting its statement on curtailments in *Panhandle Eastern* as a "[p]articularly relevant" example of an

area "uniquely fitted for federal scrutiny," the Court concluded (365 U.S. at 27–28):

> * * * The point is, as we have stated, that Congress did not desire an "attractive gap" in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production and sale of this valuable natural resource. Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than non-regulation. * * *

The infeasibility of state regulation of curtailments of service of interstate pipelines is apparent from the very nature of the problem—*i.e.*, the allocation of temporarily scarce interstate gas supplies among all classes of customers of a pipeline which makes deliveries to customers in many States. Since the delivery of natural gas to any one customer or class of customers of a pipeline in curtailment necessarily results in a diversion of gas from another customer or class of customers, the impact of a state court or regulatory agency order to deliver gas to direct users in one State would necessarily affect interstate commerce and arguably lie beyond state jurisdiction. See, *e.g.*, *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498; *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U.S. 575; *Pennsylvania* v. *West Virginia*, 262 U.S. 553. Denial of

the Commission's authority to include direct industrial customers in curtailment allocations would, therefore, be likely to leave such customers effectively free of regulation in this vital circumstance, contrary to the mandate of Congress recognized by this Court in *Panhandle Eastern* and *Transcontinental Gas*. And even if state courts or agencies could constitutionally be empowered to deal with curtailments, their exercise of this authority would vitally affect service to gas consumers in other States to whom they are not governmentally responsible. The problem clearly requires an interstate solution, and Congress therefore vested the Federal Power Commission with authority to deal with it in Section 1(b) of the Act.

B. THE COMMISSION'S POWERS TO EXERCISE THE CURTAILMENT AUTHORITY GRANTED BY SECTION 1(b) ARE DEFINED BY SECTIONS 4, 5 AND 16 OF THE NATURAL GAS ACT

If, as we have argued, the Natural Gas Act applies under Section 1(b) to the curtailment of deliveries of interstate natural gas to direct industrial customers, the Commission's authority over such curtailments is broad. The general nature of that authority is manifested by Section 16 of the Act, 15 U.S.C. 717*o*, which gives the Commission the power

> * * * to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. * * *

Referring to Section 16 in *Permian Basin Area Rate Cases*, 390 U.S. 747, 776, this Court stated:

> * * * the width of administrative authority must be measured in part by the purposes for which it was conferred * * *. Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority.

Given the magnitude and importance of the Commission's task of assuring a fair allocation of limited interstate natural gas supplies, the Commission should not be denied the necessary tools for performing that task.

An analysis of Sections 4 and 5 of the Act, 15 U.S.C. 717c and 717d, reveals specific procedures available for implementing curtailment plans and the substantive standard to guide the Commission in evaluating them. Section 4(b) contains that substantive standard in providing:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

As held by this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341, the basic authority of the Commission to set aside provi-

sions of tariffs or contracts which violate this standard or are otherwise unjust or unreasonable is contained in Section 5(a), which is incorporated by reference in Section 4(e). In the terms of that Section:

> Whenever the Commission, after a hearing * * *, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice or contract affecting such rate, charge or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order * * *.

While Section 5(a) applies to all tariffs and contracts of natural gas companies, the Commission's power is further implemented by Section 4(e) which, in the case of new or changed tariffs or contracts filed by natural gas companies under Sections 4(c) or 4(d), permits the Commission to let the new or changed provisions take effect pending an investigation by the Commission. As we will now show, this power under Section 4(e) is central to the Commission's ability to implement curtailment plans in emergency situations requiring prompt regulatory action.

One of the Commission's responses to the current shortage of natural gas forcing many interstate pipe-

lines into curtailment (see map at Pet. App. 23a) was to issue its Order No. 431 (App. B, *infra*, pp. 50–54). In that order, the Commission noted the continuing inability of interstate pipelines to meet their contractual commitments and squarely placed the burden on such pipelines to take "all steps necessary" to assure as reliable and adequate natural gas service as available supplies and capacities would permit during the 1971–1972 heating season and thereafter (*id.* at 51–52). One of the steps the order required each pipeline to take, was to submit to the Commission a written report stating how the pipeline would assure adequate service. Pipelines anticipating shortages forcing them into curtailment were ordered either to file tariff sheets containing curtailment plans or to submit a statement showing that the curtailment program presently on file was adequate. The Commission specifically noted that, in developing plans, the pipelines should consider curtailing "large boiler fuel sales where alternate fuels are available" (*id.* at 53). Finally, the Commission stated that tariffs filed pursuant to the order and approved by the Commission would control in all respects, notwithstanding inconsistent provisions in direct sales or other contracts (*id.* at 53–54).[21]

[21] It was pursuant to Order No. 431 that United filed its most recent tariff revisions governing curtailments. The initial plans filed by United were not in the form of proposed tariff revisions, but were petitions for declaratory orders interpreting United's existing tariff and contracts. The Commission's rules and regulations specifically authorize a petition seeking "a declaratory order to terminate a controversy or remove uncer-

The advantages of requiring pipelines to develop proposed curtailment plans and file them with the Commission are readily apparent. First, the system operations of pipelines vary greatly depending upon their supply capability, their underground storage and pipeline transmission facilities, and their market requirements. Most importantly, however, the requirement that the pipelines file proposed curtailment plans requiring tariff revisions brings into play the procedures embodied in Section 4(e) of the Act.

When a curtailment plan is filed as an amendment to a pipeline's tariff under Section 4(d), it becomes effective, unless suspended by the Commission, at the end of 30 days [22] or on a later date specified in the filing. Where, on account of emergency or other conditions, it appears desirable in the public interest that a plan be placed into effect, the Commission, under Section 4(e), may accept the plan for filing, suspend it for any period up to five months and allow the amended tariff provisions to take effect, subject to later review of the merits of the plan. Furthermore, in a hearing instituted under Section 4(e), the pipeline has the burden of proving that its curtailment plan conforms to the requirements of the Act and may be liable in damages to the extent that it does not.

The flexibility of the Section 4 provisions in the

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tainty." 18 C.F.R. 1.7(c). While the Commission in its curtailment opinion upheld its basic authority to consider the curtailment plans filed by United (Pet. App. 53a–66a), it has not yet ruled on the merits of the plans.

[22] Section 4(d) authorizes the Commission to waive the 30-day notice period where circumstances warrant.

context of curtailment proceedings permits the Commission, when faced with a gas shortage, to allow provisions to go into effect in order to provide a working guideline of service priorities for the pipeline, while proceedings go forward to determine whether the new provisions comply with the substantive standard of Section 4(b). Such proceedings, even if prosecuted diligently, may be lengthy and complex, requiring months or even years to complete. United's curtailment proceeding, for example, was initiated some 18 months ago.

If the Commission were denied the power to effectuate curtailment plans during the pendency of curtailment proceedings before it (*i.e.*, if the Commission could take action only after hearings initiated under Sections 5 or 7 were completed), the allocation of inadequate gas supplies among a pipeline's customers in the interim might be determined by such arbitrary factors as a customer's ability to extract his full contract volumes from the line on a self-help basis. In such circumstances, not only would the prohibition in Section 4(b) against discrimination or preferential treatment be violated; physical failure of the pipeline system would also loom as a serious prospect.

The Commission's authority to order the filing of curtailment plans under Section 4 is not inconsistent with this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra.* In that case, Mobile brought an action for damages on the ground that United had broken the fixed rate terms of its contract with Mobile by filing a rate increase with the

Commission under Section 4(d). Analyzing the interrelationship between Sections 4 and 5 of the Act, the Court held that Section 4(d) did not authorize a pipeline unilaterally to change its fixed contract rates. 350 U.S. at 339–343.

In the present curtailment context, however, the issue is not whether a pipeline can unilaterally change the terms of its contracts, but whether the Commission can order pipelines, anticipating an inability to meet full contractual commitments, to work out and file curtailment plans effecting a rational allocation of the limited supplies. In promulgating Order No. 431, the Commission merely adopted the Section 4 filing procedure as the most appropriate method of exercising its curtailment authority to meet emergency conditions and implement curtailment plans.[23] The adoption of this procedure, we submit, is fully consistent with the Commission's broad mandate under Section 16 to take appropriate action to carry out the provisions of the Act (see pp. 26–27, *supra*).

That the terms of private contracts should not interfere with the legitimate exercise of Commission authority was, in fact, squarely recognized by this Court in *Mobile*. The Court there noted that (350 U.S. at 344)

> * * * denying to natural gas companies the power unilaterally to change their contracts in

[23] Another option available to the Commission would be to establish priorities of interstate natural gas service by regulation. Indeed, such a possibility is under consideration in *Reliability of Electric and Gas Service*, FPC Docket No. R–405 (37 Fed. Reg. 780).

> no way impairs the regulatory powers of the Commission, for *the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest.* The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other. [Emphasis supplied.]

In the *Permian Basin Area Rate Cases, supra,* the Court confirmed that *Mobile* was not intended to impede the Commission's authority to protect the public interest. Specifically, the Court declared (390 U.S. at 784):

> Although the Natural Gas Act is premised upon a continuing system of private contracting, *United Gas Co.* v. *Mobile Gas Corp., supra, the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests.* * * * [Emphasis supplied.]

The Court stated that "administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances." 390 U.S. at 784.

In short, we submit that the Natural Gas Act applies under Section 1(b) to the curtailment of deliveries of interstate natural gas to direct industrial consumers and that the Commission has comprehensive authority under Sections 4, 5 and 16 of the Act over such curtailments. As a further refutation of the court of appeals' holding that the Commission's authority over curtailments to direct industrial con-

sumers is limited to Section 7 (see p. 18, *supra*), we point out that the introductory language in Section 7(c), defining the scope of the Commission's certificate authority, is similar to the corresponding language in Sections 4(b) and 5(a), defining the scope of the Act's prohibition of the granting of undue preferences and the scope of the Commission's authority to set aside unlawful tariff or contract provisions. Thus, Section 7(c), 15 U.S.C. 717f(c), provides:

> No natural-gas company * * * shall engage in the *transportation* or sale of natural gas, *subject to the jurisdiction of the Commission* [unless it has obtained a certificate therefor] * * * [Emphasis supplied].

Section 4(b), 15 U.S.C. 717c(b), similarly states:

> No natural-gas company shall, with respect to any *transportation* or sale of natural gas *subject to the jurisdiction of the Commission* [make or grant any undue preference or advantage to any person, etc.] * * * [Emphasis supplied].

Finally, the authority contained in Section 5(a), 15 U.S.C. 717d(a), is also conferred "in connection with any *transportation* or sale of natural gas, *subject to the jurisdiction of the Commission* * * *." [Emphasis supplied.] Just as Section 7(c) applies to the "transportation" of natural gas as well as its "sale", Sections 4(b) and 5(a) also apply to the "transportation" of natural gas. And, as we have pointed out, the matter of curtailments is one related to "transportation."

## II

### THE DECISION BELOW IMPROPERLY DEPRIVES THE COMMISSION OF ITS AUTHORITY TO DETERMINE ITS JURISDICTION IN THE CERTIFICATE CASE

In addition to ruling that the Commission has no continuing authority over curtailments of interstate natural gas to direct industrial customers, the court of appeals also held that the Commission has no jurisdiction to issue a certificate of public convenience and necessity under Section 7 of the Act, 15 U.S.C. 717f, with respect to United's provision of natural gas to LP&L's Nine-Mile Point generating station.

Subsequent to the court of appeals' decision, the Commission issued its opinion in the certificate case holding that, in view of the presence of interstate natural gas in the pipeline serving the Nine-Mile Point plant, it has jurisdiction over the facilities and sales in question (United Pet. App. 91a–131a). While we believe the Commission's decision was correct—particularly in light of this Court's decisions in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 535–536, and *Federal Power Commission* v. *Florida Power & Light Co.*, No. 70–38, decided January 12, 1972, slip op. p. 9, n. 10, to the effect that jurisdiction over certain facilities under the similar jurisdictional provision contained in Section 201 of the Federal Power Act, 16 U.S.C. 824, was not dependent upon the presence of any particular quantity of interstate energy—proper review of the decision can best be effected on the basis of the full

administrative record. Accordingly, the decision of the court of appeals on this point should be reversed so that review of the Commission's decision may proceed in due course under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

By failing to defer to the Commission for an initial determination whether the presence of interstate gas in the facilities in controversy brings the facilities within the Commission's jurisdiction, the court unjustifiably refused to follow the long standing rule that questions relating to an agency's subject matter jurisdiction should be determined by the agency in the first instance. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

In *Myers*, this Court rejected the argument that the determination of a court as to the jurisdiction of a federal agency could be substituted for the decision of the agency itself in a proceeding pending before the agency. Speaking for a unanimous Court, Mr. Justice Brandeis noted that such a contention (303 U.S. at 50–51):

> * * * is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where * * * the contention is made that the administrative body lacked power over the subject matter.

In reaffirming this principle more than 20 years later, the Court specifically pointed out that the need

to protect the primary authority of an agency to determine its own jurisdiction "is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the [agency]. While the [agency's] decision is not the last word, it must assuredly be the first." *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 185.

In the context of a Federal Power Commission proceeding, this Court in *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, cited *Myers* in reversing *per curiam* a court of appeals decision (156 F. 2d 821 (C.A.D.C.)) permitting an electric power company to maintain an action for a declaratory judgment on whether the Federal Power Commission had exclusive regulatory control over the company's accounting practices. The court of appeals had based its decision on the fact that the Commission's then pending proceeding could have resulted in an order forcing the company to disobey an earlier accounting order issued by a state regulatory authority. 156 F. 2d at 824–826. Responding to a similar contention, this Court stated in *Myers* (303 U.S. at 51):

> Obviously, the rule requiring exhaustion of administrative remedies cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. * * *

Decision by the court below of the certificate issue was especially inappropriate here because the court below did not have before it all the evidence which had been before the Commission. The record before the Commission on this issue consisted of 1,276 pages of transcript, 63 exhibits and 10 items by reference; this record was analyzed in detail in the course of the Commission's comprehensive opinion issued after the decision below (United Pet. App. 91a–131a). The matter was clearly one for the Commission initially to decide.

## CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 1972.

## APPENDIX A

The Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part:

Section 1:

(a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boun-

dary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission ~~that~~ such State ~~commission~~ has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Section 4:

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of services.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas

company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter

upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it was otherwise go into effect; and after full hearings either completed before or after the rate change classification or service goes into effect the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commis-

sion shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5:

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by

a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Section 7:

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of

adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited.

Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

* * * * * *

Section 16:

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

## APPENDIX B

United States of America Federal Power Commission

(18 CFR 2.70)

Before Commissioners: JOHN N. NASSIKAS, Chairman; LAWRENCE J. O'CONNOR, JR., JOHN A. CARVER, JR., and ALBERT B. BROOKE, JR.

Policy with Respect to Establishment of Measures to be Taken for the Protection of as Reliable and Adequate Service as Present Natural Gas Supplies and Capacities Will Permit; Docket No. R-418.

ORDER NO. 431

ORDER PROMULGATING STATEMENT OF GENERAL POLICY

(Issued April 15, 1971)

In 1970, the staff, having been directed, surveyed jurisdictional pipelines to determine whether adequate gas was available to the pipelines in order to fill storage fields in anticipation of the 1970-71 heating season and in anticipation of emergencies which would arise during the heating season if adequate gas supplies were not available to the consumer. It appearing to the Commission that supplies were not available, the Commission, acting pursuant to its emergency powers, promulgated Order 402 (35 F.R. 7511) and 402A (35 F.R. 8927) which authorized distribution companies to make resales of gas to other distribution companies and to jurisdictional pipelines in order to assure that the storage fields would be filled by

winter and authorized the emergency purchases of gas from otherwise nonjurisdictional companies. This action was taken on May 6, 1970 and June 3, 1970. By notice of proposed rulemaking issued October 6, 1970 and adopted December 10, 1970 the Commission amended Section 157.29 of its Regulations (Order No. 418, 35 F.R. 19173) to permit emergency purchases of gas by natural gas pipelines directly from gas producers. Notwithstanding these emergency measures, a number of natural gas pipelines indicated their inability to delivery sufficient gas to meet their firm demands. Because of the implementation of emergency purchases coupled with a winter of normal temperatures serious disruptions of service were not widespread.

*The Commission finds:*

(1) The statement of general policy herein adopted concerns a matter of general policy which does not require notice or hearing under 5 U.S.C. 553.

(2) Early dissemination of this statement of general policy is in the public interest. Good cause therefore exists to bring it to the immediate attention of persons affected thereby.

*The Commission*, acting pursuant to the authority of the Natural Gas Act, as amended, particularly sections 4, 5, 7, 8, 10, 16 thereof (52 Stat. 822, 823, 824, 825, 826, 830; 56 Stat. 83, 85, 15 U.S.C. § 717c, § 717d, § 717f, § 717g, § 717i, § 717o, *orders:*

(A) Part 2, Subchapter A, General Rules, Chapter I, Title 18 of the Code of Federal Regulations is amended by adding a new section 2.70 to read as follows:

## PART 2—GENERAL POLICY AND INTERPRETATIONS

* * * * *

### STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS UNDER THE NATURAL GAS ACT

* * * * *

### § 2.70 Measures for the Protection of Reliable and Adequate Natural Gas Service.

This Commission, charged with the responsibility for natural gas reliability, hereby promulgates as a statement of general policy that jurisdictional pipeline companies shall take all steps necessary for the protection of as reliable and adequate service as present supplies and capacities will permit during the 71–72 heating season and thereafter, including adequate injection into storage in anticipation of the heating season.

In order to effectuate the foregoing:

(1) During the storage injection season all natural gas pipelines subject to the jurisdiction of the Commission should make every reasonable effort to fill all storage fields supplied by such pipelines to a capacity sufficient to meet the anticipated heating season demands.

(2) All jurisdictional pipelines will within 30 days hereof, submit a written report (four copies) to the Secretary of the Commission indicating how the instant statement of policy will be implemented. Pipelines responding that curtailment will be necessary will file a tariff sheet, pursuant to Sections 4 and 5 of the Natural Gas Act and the Commission's Regulations thereunder, setting forth a curtailment plan to effectuate the instant policy or state that the curtailment program, if any, currently on file will effectuate this policy. The curtailment

plan proposed may be divided between the injection season and the heating season, since different objectives may require different treatment.

Consideration should be given to the curtailment of volumes equivalent to all interruptible sales and to the curtailment of large boiler fuel sales where alternate fuels are available.

(3) The Commission recognizing that additional short-term gas purchases may still be necessary to meet the 1971–1972 demands, will continue the emergency measures referred to earlier for the stated 60-day period. If the emergency purchases are to extend beyond the 60-day period paragraph 12 in the Notice issued by the Commission on July 17, 1970, in Docket No. R–389A should be utilized (35 F.R. 11638). The Commission will consider limited term certificates with pre-granted abandonment, if the pipeline demonstrates emergency need, after complying with paragraphs 1 and 2, above.

(4) Where emergency gas purchases are made and/or a curtailment program is instituted to implement the above policy the pipeline should place, or already have in effect, volumetric limitations on sales at current levels.

(5) Notice should be taken that the Commission will re-examine existing commodity rate levels and, to the extent necessary, may redesign existing commodity-demand rate relationships in present and future pipeline rate cases.

(6) Pipelines who can do so are encouraged to propose exchange arrangements with other pipelines.

(7) Jurisdictional pipelines have the responsibility in the first instance to adopt a curtailment program by filing appropriate tariffs. Such tariffs, if approved by the Commission, will control in all respects notwithstanding

inconsistent provisions in sales contracts, jurisdictional and non-jurisdictional, entered into prior to the date of the approval of the tariff.

Nothing stated herein should be construed as placing a limitation on measures to be taken by jurisdictional pipelines to effectuate the instant policy.

(B) The statement of general policy adopted herein shall be effective upon issuance of this order.

(C) The Acting Secretary shall cause prompt publication of this statement of general policy to be made in the Federal Register.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
*Acting Secretary.*

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